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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 6—Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA.

BRIEF OF AMICUS CURIAE, ROBERT E. LEE JORDAN, IN REPLY TO SUPPLEMENTAL BRIEF OF THE STATE OF CALIFORNIA.

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March, 1947.

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PAGE

INDEX.

	Page
Reply to Supplemental Brief of the State of California	1
Point I	2
Point II	20
Conclusion	25

CITATIONS.

Boggs v. Merced. Min. Co., 14 Cal. 274	3
City of Mobile v. Eslava, 16 Peters 234, 10 L. Ed. 948	18, 19
Ivanhoe Min. Co. v. Consolidated Min. Co., (1880) 102 U. S. 167	10, 12, 13
Milner v. U. S., (Utah 1915) 248 U. S. 594, 63 L. Ed. 437	20
Moore v. Smaw, 17 Cal. 199	20, 22, 24
Pollard v. Hagan, 3 How. 212	18, 25, 28
U. S. v. Castillero, 67 U. S. 17	3
U. S. v. Coronado Beach Co., 255 U. S. 472	25
U. S. v. Gear, 11 L. Ed. 523, 528	14
U. S. v. Gratiot et al., 14 Peters 526, 10 L. Ed. 578	21
U. S. v. Knight, Administrators, 67 U. S. 227	3
U. S. v. Mission Rock Co., 189 U. S. 391	4
U. S. v. Standard Oil Co. of Calif., 20 Fed. Supp. 427	17
U. S. v. Sweet, (Utah 1918) 228 Fed. 421	17
U. S. v. Utah, 283 U. S. 64	4
Work v. Louisiana, 269 U. S. 250, 256	6, 14, 15, 18
Act of 1920, 41 Stat. at Large 437	17
As amended Feb. 25, 1935, 44 Stats. 1058	17
"California Constitutional Convention, 1849," Debates, compiled by J. Ross Browne (pub. 1850)	9
Executive Documents, 3rd Sess., 46th Cong., 1880-1881, Vol. 25, p. 309	8
Oil Leasing Act of 1920, Sec. 35	16, 17
Public Law 696, 2nd Sess., 79th Cong., Chap. 916	17
U. S. C. A., Title 30, Section 181	16

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PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 12—Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA.

BRIEF OF AMICUS CURIAE, ROBERT E. LEE JORDAN, IN REPLY TO SUPPLEMENTAL BRIEF OF THE STATE OF CALIFORNIA.

In reply to the points raised by the State of California to the Brief of Amicus Curiae, Robert E. Lee Jordan, it is felt that a clear statement of the purposes of the Brief of Amicus Curiae Jordan should be restated.

The Amicus Curiae Brief was filed by said Jordan in support of the contention of the Government to ownership of the submerged lands off the coast of California, located in the marginal sea, and to the minerals (oil and gas) which might be deposited in them. The Brief of Amicus Curiae enlarged the scope of the claim of the Government, by suggesting that the tidelands off the coast of California were

also owned by the Government. That the same arguments advanced in support of the Government ownership of submerged lands applied equally to the ownership of the tidelands. The brief further contended that all filled-in lands over tide and submerged lands, as well as all tide and submerged lands within artificially enclosed harbors were equally involved in this action and should be considered as an integral part of the question to be determined by this Court, and that certain rights of citizens of the United States who had filed applications for leases for the recovery of gas and oil in the tide and submerged lands under the Oil Land Leasing Act of 1920, as amended, including amendment of Aug. 8, 1946, should be consulted with the view that the rights of citizens, thereunder, be protected.

Point I.

The Supplemental Brief of the State of California states:

> "Minerals did not remain vested in the United States when title to submerged lands vested in the State upon its admission into the Union."

Spanish and Mexican law recognized the division between the surface rights and mining rights, and was applied in nearly all of the grants made by the Spanish and Mexican Governments to lands within the territory of California. The fee for the surface rights could pass while the mineral rights would still be reserved for the crown. This division between surface and mineral rights is in practice in our country today. Lands are constantly being sold, the fee passing but the mineral rights are reserved. There is no legal basis to support any theory that the practice under Spanish and Mexican law differed from our law as it exists today. A statement, such as California has made with respect to the passing of minerals by granting the fee, without an inclusion of the mineral rights in a grant, is certainly a reservation of mineral rights.

It was asserted in the Brief of Amicus Curiae Jordan that:

> "Regardless of the question as to the title to tide and submerged lands, there is a separate and distinct question as to the ownership of minerals (oil and gas) in those lands."

It was asserted in Amicus Curiae Jordan's brief that the United States Government succeeded to the rights of ownership of mines held by Spain and Mexico and that it was the settled policy of Congress to exclude all mineral lands from grants to states unless expressly conveyed. This statement appears on page 14 of the Amicus Curiae Brief under Argument "F" and cities in support thereof decisions of this Court in the case of *United States* v. *Castillero*, 67 U. S. 17; *United States* v. *Knight, Administrators*, 67 U. S. 227, and *Boggs* v. *Merced. Min. Co.*, 14 Cal., 274. These cases state that "vacant lands in California" acquired by the United States in 1848 through the Treaty of Guadalupe Hidalgo "belong to the supreme government and that their disposal can only be made under laws emanating from that source.

In some of the cases cited the Courts have refused confirmation of mining rights under Mexican grants, yet the Courts have in these decisions stated that the vacant lands in the territory ceded to the United States belonged to the United States. That portion of the judgment above quoted was apparently overlooked by counsel for California and the same situation exists with reference to the citation of the *United States* v. *Knight, supra.*

The State of California asserts, but does not establish their claim to ownership of the beds of navigable waters which they claim vested in the State, title to the State upon its admission to statehood.

California states on page 3 of its brief that "the decisions of this Court hold that the entire fee, including all mineral rights in the lands underlying navigable waters,

passes to the State upon its admission." They cite the case of *United States* v. *Utah*, 283 U. S. 64, which was a case involving the bed of navigable portions of the Colorado River, as conclusive proof that California has the same right to the petroleum deposits beneath the submerged lands along her shores. A careful reading of the United States v. Utah case will disclose that the only question presented before the Supreme Court for consideration was the question of the navigability of the stream, which was the Colorado River. All other questions, including the right to the petroleum deposits beneath the bed of the stream, if found to be navigable, were admitted by counsel for the United States, which would appear to eliminate the decision in this case from further consideration. Even in this case, the Government made certain reservations with respect to the navigability of the stream.

The citation of the *United States* v. *Mission Rock Co.*, 189 U. S. 391, appears not to have been carefully read, for that case involved an action for ejectment, brought by the United States against the Mission Rock Co., seeking to secure possession of a small group of three rocks in San Francisco Bay which had an area of less than one acre. At the time of the Spanish-American War, the government decided that this little island, which had been purchased by the Mission Rock Co. from the State of California, and which they had improved by blowing off the tops of the rocks by filling in the surrounding submerged lands and had created a small island of an area of about fourteen acres. It had, on this island, constructed warehouses and made other improvements. The government sought to secure control of this property without compensation. The case came before the Supreme Court, as a suit in equity, and it was held that the government was not entitled in equity to eject the Mission Rock Co. This does not seem to bear out the contention that the fee of all mineral rights in lands underlying navigable waters passed to the State of California upon its admission to statehood.

It is pertinent at this point to consider under what provisions of the Constitution California was granted title to beds of navigable waters and how, without any conveyance or grant, that the minerals in the beds of navigable waters were transferred to the State of California.

It is true that there have been numerous decisions holding that the beds of navigable waters were granted to the states upon their admission, but the State of California has failed to cite any act of Congress which passed title to the State of California the bed of navigable waters in the State of California or minerals in the tide and submerged land. The decisions of various courts on the subject would indicate that this theory is pure judicial law. That there is no statutory law in support of a grant, such as is advanced by California, and unless California can present to this Court a law passed by Congress, granting the beds of navigable waters to the State of California, the claims of California are without legal foundation.

Another point which is extremely important and binding upon the State of California, is the reservation which was made by Congress in the Enabling Act which provides in Section 3:

> "Provided that nothing herein contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as Articles of Compact in the Ordinance adopted by the Convention which formed the Constitution of that State."

This provision of the Enabling Act cannot be regarded other than a reservation of everything which was in the Constitution of California, and strange as it may seem, Congress has never taken any further action or approved the Articles of Compact submitted by the State of California. Under the reservation the boundaries set by California for itself are still unapproved which eliminates the claim to tide and submerged lands and the minerals and all other matters which were submitted to Congress must

be regarded as still pending and undetermined. Under this reservation any rights which California might have claimed to the fee in land or to rights in bed of streams, navigable waters and the minerals in or under them, still remain to be acted upon by Congress before any claim to any title, under the Enabling Act, could vest. The Enabling Act is full of reservations regarding the disposal of public lands, use of water ways, taxes and other things. It is difficult to see how with the above reservation in the Enabling Act, that any rights to the bed of streams or any fee title to minerals in them could be considered as having legally vested in California.

On page 4 the State of California brief states that there was no policy in Congress in 1850 to exclude minerals from grants to a state, and cites particularly the case of *Work* v. *Louisiana*, 269 U. S. 250, 256.

It seems apparent that counsel for the State did not make a careful research of this point before making the statement above quoted. The policy of Congress with respect to reservation of minerals was formulated by Congress as early as May 20, 1785. Congress passed an ordinance, with respect to the disposal of lands in the Northwest Territory, which provided in part, as follows:

> "It is ordered that there shall be reserved one-third part of all gold, silver, lead and copper mines to be sold or otherwise disposed of, as Congress shall hereafter direct."

The deed to be given by the Commissioners of the Loan Office, with a clause of reservation in the words of the Act.

The mineral resources of the country at that time were little known. Gold and other metals, which were later found in the Northwest, were almost entirely within the domain of France and Spain. The reserve clause of the ordinance of 1785 suggests the reservation as to minerals by way of royalty or sovereign dues, and shows an existing doubt as to whether or not these mines should be leased or sold.

By resolution of April 16, 1800, Congress authorized the President to employ agents to collect information relative to the mineral resources of the country, and on March 3, 1807, Congress by Section 5 of an act for the sale of certain lands in which lead had been discovered, provided that these lands should be reserved for future disposal by the United States, and any grant which might hereafter be made for any land containing a lead mine, from the United States, should be considered fraudulent and null, thereby making it clear that minerals were to be reserved. This Act inaugurated the policy of reserving minerals, and leasing lands containing mineral deposits.

On March 25, 1816, Congress passed an act which provided—"where a tract of land applied for includes a lead mine or salt spring, no permission to work the same shall be granted without the approbation of the President of the United States."

The House of Representatives on September 8, 1823, asked for information regarding the mining regions of the Northwest. In February 1839, the House of Representatives, by resolution, asked the President to prepare a plan which would show the amount of revenue to be derived from public mineral lands, and their value as public priority.

On September 4, 1841, Congress passed an Act, Section 10 of which provided

> "No lands on which are situated any known salines or mines shall be liable to entry under or by virtue of provisions of this act."

On December 2, 1845, President Polk in his message to Congress, made certain recommendations regarding the reserved mineral land. By Act of July 11, 1846 the reserved lead mines were ordered to be exposed for sale under prescribed regulations. Further action was taken on March 1, 1847.

President Fillmore in his annual message of December 2, 1849, said:

"I also beg leave to call your attention to the propriety of extending at an early day our system of land laws, with such modifications as may be necessary, over the State of California and the territories of Utah and New Mexico. The mineral lands of California will, of course, form an exception to any general system which may be adopted."

On December 3, 1849, the Secretary of the Interior, the Hon. Thomas Ewing, calling attention of Congress to the discovery of gold in California, said in part:

"The right to the mines of precious metal, which, by the laws of Spain, remained in the crown, is believed to have been also retained by Mexico while she was sovereign of the territory and to have passed by her transfer to the United States."

"It is a right of the sovereign in the soil as perfect as if it had been expressly reserved in the body of the grant, and it will rest with Congress to determine, in those cases where lands duly granted contain gold, this right shall be asserted or relinquished. If relinquished, it will require an express law to affect the object and if retained, legislation will be necessary to provide a mode by which it shall be exercised. For it is to be observed that the regulation permitting the acquisition of a right in the mines by registry or by denouncing was simply a mode of exercising by the sovereign the proprietary right which he had in the treasure as it lay in and was connected with the soil. Thus it appears that the deposits of gold wherever found in the territory, are the property of the United States. Some legal provision is necessary for the protection and disposition of these mines and it is a matter worthy of much consideration how they should be disposed of so as best to promote the public interest and encourage individual enterprise."

Executive Documents, 3rd Session, 46th Congress 1880-81, Vol. 25, page 309.

~~Under~~ The Act of September 27, 1850, creating the office of Surveyor General of Oregon and providing for surveys and donation of lands to settlers, directs, "that no mineral

lands or lands reserved for salines shall be liable to any claim under and by virtue of the provisions" of that Act.

All of these acts by Congress would indicate that from 1785 to 1850 there had been a very definite policy on the part of the government to reserve minerals in the public domain.

California was admitted to the Union in September 1850. The conditions under which California was admitted and the plan for the disposal of the public land was different in California from other states. The constitutional convention held by the Californians in 1849 discussed the question of the boundaries of the State and also minerals. The report of the debates in the Constitutional Convention are set out in a volume entitled "California Constitutional Convention, 1849". Debates, compiled by J. Ross Browne, and published in Washington in 1850. In discussing the question of education for the children and providing for a fund for education, it was suggested that these funds might be raised by having the school lands located in mining areas. Mr. Hoppe, on page 351, states

> "Our government has always reserved the mineral lands, and we have every reason to believe that the mineral lands of California will also be reserved."

On page 464, Mr. McCarver states

> "I am in favor of any proposition that asks that the gold mines shall be granted to California; but I do not, at the same time, believe that Congress would be so likely to relinquish the gold mines as they would the public lands in any other part of the country."

On page 465, Mr. Sherwood states with reference to a resolution in relation to the public lands

> "I shall vote against this resolution. I think these lands belong to the Government of the United States. They cost the general government $15,000,000; and although it may be very well for us to ask Congress to grant them to the State of California, inasmuch as she

has no appropriation for the support of a government, I think we cannot say that of right they belong to California."

Other sentiments of the same character were expressed and indicate clearly that the Californians were at the time of the constitutional convention aware of the policy of the government in reserving minerals, that they had no right to ask the government for a grant of the minerals to the State and they had no desire to oppose the established policy of the government with respect to the reservation of minerals.

Another point which seems to have been overlooked by counsel for the State of California is that the Act of March 3, 1853 definitely made a reservation of minerals in California. It might be well, in order to save the time of the Court, that certain provisions of that act as set out in the finding of the court in *Ivanhoe Min. Co.* v. *Consolidated Min. Co.*, (1880), 102 U. S. 167 be cited.

"The 12th section grants to the State seventy-two sections for the use of a seminary of learning to be selected by the Governor or someone appointed by him, in legal subdivisions of not less than a quarter-section, of any unsold, unoccupied, and unappropriated public lands;

'Provided, That no mineral lands or lands reserved for any public purpose whatever, or lands to which any settler may be entitled, under the provisions of this Act, shall be subject to such selection.'

The 18th section also grants the State ten sections of land for the purpose of erecting the public buildings of the State, with the same proviso as the one to section 12.

The proviso to the 3d section is also relied upon as indicative of the purpose of Congress in regard to the mineral lands of California. That section contains the authority under which the Surveyor-General is to act in surveying the public lands in that State, and, after investing him with the powers conferred on other Surveyors-General, and some specific directions for the survey of private land claims, it is

'Provided, That none other than township lines shall be surveyed where the lands are mineral, or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked on the field, and were actually necessary to be run.'

It is strongly urged by plaintiff's counsel that the language of the granting clause imports a grant in praesenti, and that wherever by any survey of the government thereafter made the location of the 16th and 36th sections of a township was ascertained, it establishes the title in the State from the date of the statute, namely: March 3, 1853.

It is quite unnecessary to enter upon this question, which has been before us in so many shapes; for, if it be conceded that such would be the effect of the statute if there were no words of exception in the grant, Congress has in nearly every case where the question has arisen, made such specific exceptions to the operation of the grant as to decide the matter without resort to the rule of construction asserted by plaintiffs.

During this period, however, from 1849 to 1866, the system of the disposition of the public lands, in general, had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and in all this the attention of Congress was, necessarily, turned to the distinction between mineral lands and the ordinary agricultural lands of the other Western States to which similar laws had applied. This distinction is nowhere more plainly manifested than in this Act of 1853. As we have said in Sherman v. Buick, 93 U. S., 209 (XXIII., 849), the main purpose of that Act was to provide for the survey and sale of the public lands and for the right of preemption to the settler on these lands; and there was embraced in this clause of preemption the grant of the 16th and 36th sections to the State for school purposes. In the very sentence which contains this grant in parenthesis, and while introducing the new principle, that the public lands should be subject to the right of preemption, whether surveyed or unsurveyed, the mineral lands are excepted, in express terms, from this right and from public sale.

We say that this introduced a new principle in preemption law; for, except in a very few cases, no right of preemption had before existed until the lands were surveyed, so that the premptor could designate, by the description of the congressional survey, the precise land to which his preemption attached.

But this right of preemption on unsurveyed lands was, by this statute, to last but one year; and so careful was Congress to protect mineral land from sale and from preemption that, as we have already shown by the proviso to section 3, of the Act, the surveyors were forbidden to extend their surveys over mineral lands.

The effect of this was as Congress intended it should be, that as no surveys could be made of mineral lands until further order of Congress, there could be no sale, preemption or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was, undoubtedly, to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

It is a strong corroboration of this view that Congress, in the section (12) of this same statute giving the State seventy-two sections for a seminary of learning, declares that no mineral lands shall be taken under the grant, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State.

We find a similar provision in the grant to the Pacific Railroad Companies, whose road it was known would pass through some of these mineral regions. By the 4th section of the Act of 1864, 13 Stat. at L., 356, it is declared that neither that Act nor the Act of 1862, 12 Stat. at L., 489, shall be held to include in the grant 'Any government reservation or mineral lands or the improvements of any bona fide settler on any lands returned or denominated mineral lands.'

Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Con-

> gressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from preemption and above all from grants, whether for railroads, public buildings or other purposes, and looking to the fact that from all the grants made in this Act they are reserved, one of which is for school purposes, besides the 16th and 36th sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State."

The Act of 1851, which provided for the appointment of commissioners whose duty it was to determine the rights of holders of Spanish and Mexican grants in the territory embraced by California, provided that all of these claims should be filed within a period of two years and that after these claims had been determined by the commissioners, all of the remaining land

> "shall be deemed held, and considered as part of the public domain of the United States."

Inasmuch as California had no land of any kind granted it by Congress at the time of its admission to Statehood, that it was not entitled to secure any land until after the territory had been surveyed, and that the survey could not have been completed for a number of years afterward, probably five or six, it would seem that any grant of land or minerals which California might, by wishful thinking, allege, was transferred to it by the Enabling Act, was not in being at the time of admission and could not vest or would be repealed by the Act of March 3, 1853, which definitely excluded all minerals in the land. No land of any kind, which had been ceded by Mexico to the United States, was excluded or excepted by the Act of 1851, and the reservation of minerals by the established policy of Congress and under the Act of 1853, certainly did not leave anything which could have been, by implication, passed on to the State of California. The following citation, which is reproduced at

some length, does, it is believed, answer all of the questions raised on this subject in the supplemental brief of California.

> "Then the question occurs, whether the section of an Act, in general terms to sell (certain reservations excepted), without any reference to the previous Act, which declares that lead mines in the Indian territory shall be reserved for the future disposal of the United States, is so far a repeal of the latter, that lead mines in a part of that territory are subjected to sale as other public lands are. Why should Congress, without certain words show an intention to depart from the policy which had governed its legislation in respect to lead mine lands in the whole of the Indian territory from 1807 to 1834 be supposed to have meant to exempt a portion of the lead mine lands in that territory from that policy.
>
> The reservations in the 4th section of the Act of 1834 are limitations upon the authority to sell, and not an enlargement of the general power of the President to sell lands, which by law, he never had a power to sell; which have always been prohibited by law from being sold, and which never have been sold, except under the authority of a special statute, such as that of the 3rd of March 1829 (1 Land Laws 457). In looking at that Act, no one can fail to observe the care taken by the Government to preserve its property in the lead mine lands, or to come to the conclusion that the reservations of them can only be released by special legislation upon the subject matter of such reservations.
>
> In this case, all lands within the District, mean lands in which there are, and in which there are not, minerals or lead mines; but a power to sell all lands, given in a law subsequent to another law expressly reserves lead mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation."
>
> *U. S.* v. *Gear*, 11 L. Ed. 523, 528.

With reference to the *Work* v. *Louisiana case*, which is quoted by the State of California for the purpose of establishing the lack of a mineral policy on the part of the gov-

ernment, seems to have been answered by the foregoing citation, but in that case the Court said of this case:

> "It is not one to establish the title of the State nor one to quiet title. It does not seek an adjudication that the lands were swamp and overflow lands or to restrain the Secretary from hearing and determining this question, but merely seeks the right of the State to have this question determined without reference to their mineral character. In short, it is merely a suit to restrain the Secretary from rejecting its claim, independently of its merits otherwise, upon an unauthorized ruling of law, illegally requiring it, as a condition precedent to show that the lands are not mineral in character."

It is to be noted that this was a case involving swamp and overflow lands and has no application to the reservation of minerals in tide and submerged lands in California and is not in point, and further that counsel for the United States failed to make a proper research of the policy of the government with respect to mineral reservations in that case and to give it to the Court.

> "'The grant of swamp lands made by the Act of 1849 and 1850 gave the States an inchoate title to such lands that became perfect as of the dates of the Acts, when they had been identified as required and the legal title had passed by the approval of the Secretary under the Act of 1849, or the issuing of a patent under the Act of 1850. This has long been the settled construction of the Act of 1850." *Work* v. *Louisiana*, 269 U. S. 250, 256.

None of the things required to be done under said Act to acquire title were ever performed by California in 1850, by or under which any claim to any grant might be sustained.

In the Act of July 22, 1854, establishing the Office of Surveyor Generals of New Mexico, Kansas and Nebraska, there was directed that

> "None of the provisions of that Act shall extend to minerals or school lands, salines, military or other reservations."

In 1866 the Preemption Act was passed, which for the first time definitely fixed a policy on the part of the government with respect to the disposal of mineral lands. On April 18, 1876, the Attorney General of the United States, in an opinion respecting mineral lands, held that salines, gold, silver, lead, and copper mines were reserved for future disposal of Congress. Several other acts of Congress were passed in the interim from 1876 to 1920, when the Government passed the Oil Land Leasing Act, which constituted a further extension of the policy of reserving minerals and provided regulations through the Department of the Interior for the development of oil and gas. It is important to note that in the Act of 1920, the law provided:

> "Deposits of coal, phosphate, sodium potassium, oil shales or oil and gas and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided"—

It is to be noted that this provision does not state anything about oil or gas being in the public domain, but states only that "the *deposits* and lands containing such deposits owned by the United States are reserved," U. S. C. A., Title 30, Section 181.

Also in the Oil Land Leasing Act of 1920, Section 35 contains provision as follows:

> SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production *52½ per centum* of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for the past production 20 per centum, and for *future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of*

> *the Treasury after the expiration of each fiscal year to the State within the boundaries* of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

This is a further confirmation of the continuation of the policy of reserving minerals and of providing for the sharing by the states in the revenue which may be derived from the development of oil and gas, (Act of 1920, 41 Stat. at Large 437) and as amended February 25, 1935, (44 Stats. 1058) and Public Law 696, 79th Congress, Chapter 916, Second Session, approved August 8, 1946).

Special attention is directed to the fact that the complaint of the Government does not include swamp or overflowed lands in California but only to submerged land and in any event, California was in no position in 1850 to select any swamp or over-flowed lands or to comply with the requirements as set out in the decision of *Work* v. *Louisiana*, *supra*.

The State of California raises a question as to the applicability of the decision of the *United States* v. *Sweet*, Utah 1918, 228 Fed. 421. The decision provides:

> "Every grant of public lands, whether to a state or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them."

In the case of the *United States* v. *Standard Oil Company of California*, 20 Fed. Supp. 427, it was held:

> "The California school lands, granted by the United States, are through judicial interpretation, subject to mineral reservations."

It is therefore true that the decision in the *Work* v. *Louisiana* case contains no finding which is applicable at all to the situation in California, and is, therefore, valueless as supporting the doctrine advanced by California.

In reply to Point 3 on Page 9 of the State of California Supplemental Brief, the citation of the case of *Pollard* v. *Hagan*, 3 How. 212, requires careful study. A reading of this case will disclose that the land which was the subject of the suit had, by an Act of Congress, been previously transferred to the City of Mobile, Alabama, which fact is disclosed in the case of the *City of Mobile* v. *Eslava*, 16 Peters 234, 10 L. Ed. 948. The United States was not a party, and having neither title nor interest in the res, nothing which was said by the Supreme Court, could or would be binding upon the United States Government and must be regarded as pure dictum. The City of Mobile certainly must have felt that the title to the underwater lots were owned by the Government, otherwise there would have been no request for an act of Congress transferring them to Alabama. A reading of the case will disclose that upon the facts, the argument advanced by the State of California and supported by the dictum in the *Pollard* v. *Hagan* case is without merit. This Court is well advised as to the doctrine of dictum and knows that every part of any judgment which is not upon the question before the Court, carries no weight and is not considered as being authoritative. The Court is urgently asked to disregard every case cited by the State of California which is based upon the decision in the *Pollard* v. *Hagan* case, because as they affect the interests of the United States, they are pure dictum and the United States not being a party is not bound thereby.

It is requested that the Court read the dissenting opinion of Mr. Justice Catron in the *Pollard* v. *Hagan case*. Justice Catron was recognized as the real authority and soundest thinker of the then Supreme Court on questions of law and property title, and in the *Pollard* v. *Hagan* case his dissenting opinion took the Court to task for altering its rea-

soning and theory for political reasons and contrary to its opinion in the *Mobile* v. *Eslava* case, which had been decided several years previously. All the language with respect to the interests of the United States was dictum and not necessary to the decision of the simple question of property law involved. The United States had divested itself of title by act of Congress and not being a party to the action had no interest calling for an opinion.

The suggestion of the State of California that had Congress intended to reserve the minerals in lands beneath navigable waters it would have done so by express exclusion or reservation, again raises the question as to what act of Congress ever gave to the State of California the beds of navigable waters. This point does not seem to have been covered in the brief of the State of California, and without having direct proof of title, the negative position charging Congress with having failed to make certain reservations when no grant had ever been made, seems fatuous. The policy of reserving deposits of minerals wherever they might be, in land owned by the United States Government, would definitely exclude any claim to minerals in the beds of navigable streams on the part of the State of California.

> "Where the question was whether a grant by the Utah Enabling Act of July 16, 1894, C. 138, 28 Stats. 107, of lands to the State, for the support of common schools, which grant neither expressly included mineral lands nor expressly excluded them, included coal lands known to be such before Utah became a State, the Court, after saying that the mining laws taken collectively disclosed an intention not only to establish a particular mode of disposition of mineral lands, but also to except and reserve them from all other grants and modes of disposal where there is no expressed provision for their inclusion, and that the school grant to Utah must be read in the light of such laws as the School Land Indemnity Law and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will, decided that when so

read said enabling act did not show a purpose to include mineral lands." (U. S. v. Sweet, Utah 1918, 228 Fed. 421).

Milner v. *U. S.* (Utah 1915), 248 U. S. 594, 63 L. Ed. 437.

Point II.

In reply to the second point of the brief of the State of California, which appears on Page 10, it is to be noted that the State of California has offered no proof contrary to that presented in the brief of Amicus Curiae, pages 4 to 8, concerning the meaning of equal footing or to discredit the quotation from *Moore* v. *Smaw*; 17 Cal. 199, made by Chief Justice Field of the State of California defining the distinction between political and sovereign authority (Amicus Curiae brief p. 6).

It is not obvious, as the State of California suggests, that the constitutional doctrine of equality of states does not require some proof of the constitutional grant of beds of navigable waters within their boundaries. The State has, unfortunately for them, seized upon a geographical inequality as being the basis for the claim that equality would not require the granting of other things beside the beds of navigable waters. The thirteen original States owned all of the lands within their borders and if there was to have been equality as suggested by the State of California, there should have been no necessity for the granting to the State of California of 500,000 acres of land and additional lands for a university, public buildings, and schools. If California was to come into the Union on an equal footing, all of this land within the borders of California would have come to them by virtue of the enabling act. It seems rather absurd that the only premium California received for joining the Union was a grant of beds under navigable waters within the State. The State of California forgets that it did not come into the Union as one of the thirteen original States but under the Constitution Art. 4, Sec. 4, that it owned nothing at the time of its constitutional convention

or at the time of its admission into the Union, and had not Congress made a donation of land to California, it would still be without land today, notwithstanding it had been admitted to the Union on an equal footing.

The State of California will not deny that all of the territory which was ceded by Mexico was ceded to the United States Government, and whatever title there was to any lands within that territory vested in the United States and that the only way the title could be transferred under the Constitution was under Article 4, Section 3.

> "The Constitution of the United States, Article 4, Section 3, provides: 'That Congress shall have power to dispose of and make all needful rules or regulations respecting the territory or other property belonging to the United States.' The term 'territory' as here used, is merely descriptive of one kind of property and is equivalent to the word 'lands', and Congress has the same power over it as of any other property belonging to the United States; and this power is vested in Congress without limitation and has been considered the foundation upon which the territorial government rests.
>
> It has been the policy of the Government at all times in disposing of the public lands, to reserve the mines for the use of the United States."

U. S. v. *Gratiot et al.*, 14 Peters 526, 10 L. Ed. 578.

California has not shown this court that Congress by any Act gave to California the tide or submerged lands, that they have ever applied to the Government for any tide or submerged lands up to 1920, when the Oil Land Leasing Act was first passed. Attention must be called to the fact that in 1921, after California passed its own leasing act Stat. 1921, P. 404, Amended Stat. 1923 P. 593, which was almost identical to the Federal Land Leasing Act of 1920, they discovered, upon investigation and the advice of the Attorney General, that California did not have title to either the tide or submerged lands and that the State had no right to lease tide or submerged lands for the recovery and development of oil and gas, and that in 1929, Chapter 536, of the Statutes

of California for 1929, the Legislature of the State, by and with the approval and the signature of the Governor, passed an act prohibiting any State official or political subdivision or officer thereof from granting any leases to drill upon the "tide land, whether filled or unfilled, submerged lands, over-flowed land, or beds of navigable rivers or lakes," and by so doing to extract minerals therefrom. This constitutes a rather complete answer to the claim of California to beds of rivers and lakes. They are defeated by their own laws. However, notwithstanding this act of the Legislature, the State of California showed an utter lack of good faith by passing an act in 1938, permitting whipstock or directional drilling from the uplands to drain oil out from under the tide and submerged lands. It is only necessary to state that this practice is contrary to the established laws of the State of California but so long as it was the oil of the Government and they were reaping the profits, the law didn't matter.

Amicus Curiae Jordan denies that there is any legal principle supported by any act of Congress whch automatically grants to a state upon its admission, the ownership of beds of navigable waters within their boundaries. The complaint of the Government particularly excludes all navigable waters within the State and the cases cited in nearly every case are for beds of navigable waters within the confines of the State, and do not apply to navigable waters in the ocean, or water over the tide lands.

Counsel for the State of California, in quoting Justice Field of the State of California in the *Moore* v. *Smaw* case, cites on page 12:

> "That this case expressly recognizes that the United States held certain rights of sovereignty—title to land beneath navigable waters—only in trust for the future State, which rights at once vested in the State upon her admission into the Union."

Amicus Curiae Jordan is compelled to raise a question as to the right of the Courts, without legislative action by

Congress, to create a fiduciary position on the part of the United States. There is nothing in the Constitution which provides that the United States Government or Congress should act as a trustee. The whole idea is entirely foreign to our system of government. Congress, under the Constitution, Article 4, Sec. 3, holds all of the property of the United States and is authorized to make rules and regulations for its disposal. It holds the property of the United States not as a trustee, but as a sole proprietor, and it can dispose of the land in any way it sees fit, and is not bound by any trust with respect to any of the land. The idea of a trust is purely a judicial one, and has no law to support it. The lands of the Government belong to the Government and title could only be granted to any part of it by act of Congress, and there is no other way under the Constitution by which property can be transferred or rights in property acquired without a specific act of Congress transferring the property. The idea of trust and holding property in trust for future States is pure dictum, was never necessary in the transfer of any property, and cannot direct or control the disposition of property by the Congress.

With reference to the Act of March 3, 1851, Page 13 of the State of California Brief, Amicus Curiae is unable to agree with the argument advanced by the State of California with respect to the purpose of that Act. The point which should be emphasized is the fact that even after California was admitted to statehood in 1850, Congress withheld the donation of any of the land within the territory embraced in the borders which California had set for itself until after the claims of Spaniards and Mexicans had been determined. The period allowed for this was two years. By this Act, California could not receive any of the grants which Congress was willing to make to it, until in 1853, and the Act further provided that all of the land which remained free after the claims of Mexican and Spanish claims had been decided was to be held and considered as a part of the public domain of the United States. This meant that all of the territory was owned by the United

States up to 1853, and that no part of it would be transferred to California until after the two-year period had elapsed, and that California could not secure possession of any of the land which Congress had determined to donate to California before that date. There was the further reservation in the Enabling Act that California should not interfere with the disposal of the public domain, and further provided that after survey, the sections surveyed were to be subject to selection by the Legislature of the State of California, and yet again provided in the Act of March 31, 1853, for the reservation of minerals.

Attention is also directed to the fact that the surveyors were directed not to survey mineral lands and that up to this time no survey has been made by the Government of the tide and submerged lands, which would have made it impossible for California to have selected any tide or submerged lands because they had never been surveyed and California was limited to the selection of surveyed lands only.

The citation of Amicus Curiae of the *Moore* v. *Smaw* case, 17 Cal. 199, was for the purpose of presenting to this Court the distinction which Justice Fields had made between political and sovereign authority, particularly with respect to the ownership of minerals. We presume there is no question that the quotation is from the decision of Justice Fields of California, and it states exactly what Amicus Curiae wishes to present to the Court for its information.

A further reason why it is necessary to hold that the tide and submerged lands belong to the United States Government is that the Government, under the Treaty with Mexico, assumed certain international obligations which it could not pass on to the State of California. These obligations consisted in the investigation of the grants to Spaniards and Mexicans in California. Some of these grants bordered on the sea and included tide lands. These tide lands never were possessed by the United States and California could not, therefore, have acquired any interest in

them or the minerals which might be under them. The United States was bound by her treaty obligations with Mexico to carry out the provisions of the treaty and would have been greatly embarrassed under the theory of the State of California that all of the lands under navigable waters, including tidelands, passed upon admission of California to statehood, which would have prevented the United States from carrying out its treaty obligations.

The citations as given by the State of California, on the bottom of Page 13 and the top of Page 14, with the exception of *United States* v. *Coronado Beach Co.*, 255 U. S. 472, which have not been explained heretofore, are all cases in which the United States was not a party, and that all of these decisions relating to interests of the United States and which may have been founded upon the decision of *Pollard* v. *Hagan* are pure dictum, and cannot be considered as authoritative or binding on the United States Government.

On Page 14 of the State of California's brief, a question is raised as to the Act of Congress of July 22, 1854, 10 Stats., Page 308, Sec. 4, on the grounds that this Act covered the establishment of surveyor generals offices in the territory of New Mexico, Kansas, and Nebraska. This Act of Congress was cited purely for the purpose of establishing the general policy of the Government in the reservation of minerals, and that this reservation of minerals was not exclusive for the State of California, but was one which Congress made applicable to other States, and would seem to firmly establish that the United States Government definitely had a policy with respect to the reservation of minerals which it was prepared to put into operation wherever Congress thought it advisable.

Conclusion.

It is the desire of Amicus Curiae to call attention to the fact that this suit was instituted for the purpose of securing for the United States the ownership of oil and gas in

the submerged lands of the coast of California. It has been noted with regret that the brief of the Government fails to mention oil or the rights which the Government has in the minerals in the State of California. That the brief of the Government, in the opinion of Amicus Curiae, does not set forth the historical facts regarding the reservation of minerals or the laws which have been passed establishing the policy for the conservation of the Nation's natural resources of minerals or has pointed out the necessity for the good of the country that its resources should be held for the protection and benefit of the Nation in times such as the present.

Amicus Curiae hopes that the brief filed which sets out the rights of the United States Government in the deposits of minerals in California will convince the Court of the Government's right to those minerals by virtue of the established policy of the Government from 1785 to date; and particularly to the oil and gas in the tide and submerged lands of the coast of California by virtue of reservations made specifically of minerals in California by Congressional act.

Amicus Curiae calls attention to the fact that none of the points made in his brief have been questioned by the State of California, with the exception of two. This supplemental brief Amicus Curiae believes disposes of the two points raised by California and submits that all other facts contained in Amicus Curiae's brief and the law cited in support of them are admitted by California. Amicus Curiae believes that upon the basis of his brief and this supplemental brief in reply to the State of California, it has been established that the Government is the owner not only of the minerals in the submerged lands under the marginal sea but also of the tide lands of all filled-in lands, over tide and submerged ands and all lands, tide and submerged and filed-in lands, in artificially enclosed harbors. Amicus Curiae believes that the map contained in his brief, Exhibit 2, setting out the coastline of the district around

Long Beach Harbor, should be used as a guide for fixing the line of the coast from which tide lands should be measured.

Amicus Curiae calls particular attention to the bad faith of California after having been advised that it had no claim to the tide and submerged lands and repealing its Leasing Act on May 28, 1929, Statutes of 1929, page 944, then later, in order to secure the oil from the tide and submerged lands, authorized the drilling of oil wells from the upland and slanting them out under the ocean and under tide and submerged lands and pumped the oil out of lands which by its legislative act it admitted it did not own, to the loss and damage of the Government.

The brief of California sets out the great expenditures which have been made in the development of ports and harbors along the coast of California and what loss would be suffered by California should the Government establish its claim and right of ownership in the tide and submerged lands and the mineral deposits in them. It must be pointed out that the people of the United States have contributed hundreds of millions of dollars to the construction of those various harbors and harbor installation and that a great part of what it has cost California has been paid out of oil taken from the reserves of the Government in the submerged and tide lands.

Amicus Curiae does not believe that there is any legal foundation supported by any act of Congress that any interests in land of any kind was granted the State of California upon its admission to the Union; and that California has offered no evidence of Congressional action by which they can sustain any claim to any land or interest therein, when the laws which were in force prior to and subsequent to the admission of California are taken into consideration and applied to the facts as they existed and exist. The record of the legislature withdrawing the grant of oil leases on tide and submerged lands for the extraction of oil in 1929 is proof that up to that time California did not claim

any rights in the bed of the ocean, the tide lands, overflowed land and beds of rivers and lakes, or the minerals in them, but knew that deposits of minerals belonged to the Government just as clearly as did the representatives in the State Constitutional Convention in 1850. The Act of 1929 of the California legislature represented a surrender of their claim to interests to the minerals in all lands set out in their Act of 1929.

The theory that anything was granted to California by the "equal footing" clause in the Enabling Act, is in my opinion the only straw left by and under which, California could advance any claim and that straw is so thin and weak that it cannot support their contention.

The cases cited in support of the California theory are nearly all cases in which the United States was not a party and are therefore not relevant, being dicta, and all cases predicated upon the *Pollard* v. *Hagan* case are likewise without authority and should be reversed.

The guiding principle with respect to the instant litigation is embodied in the Acts of Congress under the authority of the Constitution, Article 4, Sections 3 and 4, and must be so determined in conjunction with the reservations of the Enabling Act.

Respectfully submitted,

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